In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-274

REBECCA BIBBS, ADMINISTRATOR OF THE ESTATE OF WAYNE BIBBS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners' son Wayne, when he was 17 years of age enlisted in the United States Army with their consent, which they claim was given only after the recruiter assured them that pursuant to Army regulations no recruit under 18 years of age could be sent into a combat zone.[1] After completing basic training in the United States, Wayne was sent to South Vietnam as a helicopter gunner and was killed by enemy fire.

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[1]10 U.S.C. 505(a) provides in pertinent part: "[N]o male person under eighteen years of age * * * may be originally enlisted without the written consent of his parent or guardian, if he has a parent or guardian entitled to his custody and control."

Army Regulation 614-30, para. 8-1j(3) (o) (July 31, 1970) provides in pertinent part: "Individuals who have not attained their 18th birthday are not eligible for assignment to a hostile fire zone."

Petitioners brought this suit in the Court of Claims on June 10, 1974, seeking damages for their son's death. On April 25, 1975, the Court of Claims dismissed the suit, holding that the complaint sounded in tort and was therefore beyond its jurisdiction under the Tucker Act, 28 U.S.C. 1491 (Pet. App. 1a-2a). A petition for reconsideration was denied on May 30, 1975 (Pet. App. 3a-4a).

1. The Tucker Act confers upon the Court of Claims jurisdiction to render judgment on any claim against the United States founded upon, *inter alia*, "any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases *not sounding in tort*." 28 U.S.C. 1491 (emphasis supplied). Petitioners claim that the Court of claims had jurisdiction in this case because their complaint was based on a "contract with the United States" within the meaning of the Act.

In determining whether it has jurisdiction over a particular claim, a court must "look beyond the literal meaning of the language to ascertain the real cause of complaint." *United States* v. *Neustadt*, 366 U.S. 696, 703 (quoting from *Hall* v. *United States*, 274 F.2d 69, 71 (C.A. 10)). An examination of the "real cause of [petitioners'] complaint" demonstrates that the facts pleaded make out a case either for a violation of a standard of care established by regulation amounting to negligence, or for wrongful death. The Court of Claims therefore properly concluded that "the action though pleaded in a contract form is an action sounding in tort" (Pet. App. 1a). The Tucker Act by its terms excludes from the jurisdiction of the Court of Claims all actions "sounding in tort." See *Pearson* v. *United States*, 267 U.S. 423; *Basso* v. *United States*, 239 U.S. 602, 606-607; *Schillinger* v. *United States*, 155 U.S. 163.

2. Petitioners' alternative contention that their claim is founded on a "regulation of an executive department," within the meaning of the Tucker Act, is also without merit. Many harms caused by agents of the government could be said to violate some statutory or regulatory directive. But the historical intention of Congress to grant Tucker Act jurisdiction only over claims "not sounding in tort" precludes petitioners' construction of the Act. See Schwartz and Jacoby, *Litigation With the Federal Government* §8.105 (1970). Thus, it is established that "not every claim involving or invoking * * * a regulation" is cognizable in the Court of Claims. *Eastport Steamship Corp.* v. *United States*, 372 F.2d 1002, 1007 (Ct. Cl.). For there to be jurisdiction in the Court of Claims, the allegation must be that "some specific provision of law [or regulation] embodies a command to the United States to pay the plaintiff some money, upon proof of conditions which he is said to meet." *Id.* at 1008. Monetary claims that do not flow from a regulation that can fairly be interpreted as mandating compensation are beyond the Court of Claims' jurisdiction, even though they "may intimately involve" an executive regulation. *Id.* at 1008-1009.[2] "Thus, conduct by a government servant, familiar as a classic tort," even though in some way involving or implicating an executive regulation, is not within the Tucker Act

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[2]Four of the five cases relied upon by petitioners (Pet. 12), involved statutes or regulations mandating the payment of money. The fifth case, *Cutler-Hammer, Inc.* v. *United States*, 441 F.2d 1179 (Ct. Cl.), was a contract case involving the question whether a particular Treasury Department regulation constituted an offer; the Court of Claims concluded that it did not.

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jurisdiction as a claim founded upon a regulation. Schwartz and Jacoby, *supra*, §8.105.[3]

The regulation involved here merely provides that individuals who have not attained their eighteenth birthday are not eligible for assignment to a hostile fire zone. It in no way gives an individual under 18 who is sent to a combat zone in violation of the regulation a right to compensation for the Army's failure to follow the regulation. Thus, the death of petitioners' son resulting from an alleged violation of the regulation by the Army "smacks more of tort than of non-tortious obligation." *Eastport Steamship Corp.* v. *United States*, *supra*, 372 F.2d at 1010. See also *Clark* v. *United States*, 461 F.2d 781 (Ct. Cl.), certiorari denied, 409 U.S. 1028.[4] Whatever the characterization given the complaint by petitioners, "the gravamen of the cause of action, under normal legal theory, would be tortious as between private

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[3]In *Eastport Steamship Corp.* v. *United States*, *supra*, 372 F.2d at 1009, the Court of Claims noted that in order to determine the limits of its jurisdiction under the Tucker Act "what one must always ask is whether * * * the legislation [or regulation] which the claimant cites can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained. If not, [the Court of Claims] cannot give relief under [that part of the Tucker Act codified in 28 U.S.C. 1491], although some separate general principle—arising, for example, from tort law—might lead to a remedy in another forum or under some special relief provision."

[4]In *Clark*, Air Force Reservists sought compensation when the Air Force failed to reassign them to the Standby Reserve when their Ready Reserve Agreements expired, as the Air Force Manual required. The Court of Claims held (461 F.2d at 783): "It is clear that the claims of the plaintiffs sound in tort. They are based on the violation of the above-cited regulation by the Air Force. This court does not have jurisdiction of tort claims."

parties." *Eastport Steamship Corp.* v. *United States*, *supra*, 372 F.2d at 1013. The Court of Claims applied the same standard here and properly dismissed petitioners' complaint for lack of jurisdiction.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[5]To read the Tucker Act as a grant of jurisdiction in this kind of case would impute to Congress an intention, in the Tucker Act, to vest the Court of Claims with jurisdiction over the torts that it excluded from the coverage of the Federal Tort Claims Act, such as claims arising out of the combatant activities of the military forces during time of war (28 U.S.C. 2680(j)) and claims arising in a foreign country (28 U.S.C. 2680(k)). None of the cases relied upon by petitioners (Pet. 12) suggests that Congress intended the Tucker Act to be read in this way and none involved claims, such as petitioners' here, sounding in tort.